

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL WISDOM)	
Claimant)	
)	
VS.)	
)	
SALVATION ARMY)	
Respondent)	Docket No. 1,056,292
)	
AND)	
)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the July 27, 2011 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

Michael Wisdom fell from a ladder while prepping the walls for painting in respondent's headquarters. The parties disagreed whether Wisdom was an employee when the accident happened. Respondent argued Wisdom was an independent contractor. The Administrative Law Judge (ALJ) found Wisdom failed to sustain his burden of proof that he was either respondent's employee or a volunteer and denied Wisdom's request for benefits.

Wisdom requests review of whether the ALJ erred in not finding him respondent's employee. Conversely, respondent argues that Wisdom was an independent contractor and the ALJ's Order should be affirmed.

The issue raised by Wisdom on this appeal from a preliminary Order is whether he was respondent's employee on the date of accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Michael L. Wisdom is a 48-year old high school graduate. He has worked mostly in construction and also as a truck driver. Wisdom owned and operated Wiz's Construction, a construction business. Wisdom was also a member of the Salvation Army Church. On January 7, 2011, while doing some prep work on the walls at Salvation Army's headquarters Wisdom fell off a ladder and injured his right shoulder as well as fractured his calcaneus (heel bone).

Wisdom testified that Captain Rick Hamelund hired him to prep the walls so that volunteers could paint. Wisdom further testified that Captain Hamelund also requested that he change some electric outlets, electric cover plates and electrical lights. Wisdom testified that he was to be paid \$12.50 an hour. There was no discussion regarding whether or not claimant was an independent contractor. No contract was signed between Captain Hamelund and Wisdom. Wisdom's working hours were not discussed nor how much work he would be doing. Wisdom did not fill out an employment application or tax forms. Wisdom's hours of work varied in the first four to five days he worked before the accidental injury. Respondent provided some equipment and Wisdom provided his own equipment as well. Wisdom opined that Captain Hamelund had the right to fire him.

Wisdom testified that he shopped for cheapest materials in order to get the job done. Wisdom agreed it was his choice to pick out the paint, drywall supplies, light switch plates and paint brushes to be purchased using respondent's Home Depot credit card. Wisdom further testified that he was not instructed on how to go about prepping, mudding and taping the walls. He was not required to work specific hours and he used some of his own equipment as well as respondent's equipment.

Captain Hamelund testified that Wisdom told him that he was a subcontractor and showed him pictures of work he had done for other people. Captain Hamelund agreed that he had asked Wisdom to prep the walls, replace 6 or 7 outlets and switches and that he would pay Wisdom \$12 an hour. Captain Hamelund agreed there was no written contract. "I hired him as a subcontractor to fix my, to prep the walls."¹ Wisdom was supposed to keep track of his working hours. Captain Hamelund thought Wisdom was limited to the project of prepping the walls.

After the accident Wisdom requested that Captain Hamelund call him a volunteer. Captain Hamelund testified:

Q. Tell me what was said in that conversation.

A. What I remember in the conversation is he told me what happened and then a little bit later, I believe it was, because I remember talking to him in the emergency

¹ P.H. Trans. at 63.

room and then I think the following day Mike mentioned about considering him as a volunteer.

Q. Why did he ask you to consider him as a volunteer?

MR. O'CONNOR: Well --

(Whereupon, the previous question from page 64, line 9, through page 64, line 10 was read by the reporter.)

MR. O'CONNOR: Calling for speculation.

JUDGE HOWARD: Overruled. You may answer.

A. He said, oh, because he said that he did not have insurance and that workman's comp would cover him if he was a volunteer.²

Captain Hamelund thought he had the right to fire Wisdom as he would a subcontractor.

It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are elements pertaining to both relationships which may occur without being determinative of the relationship.³ There is no absolute rule for determining whether an individual is an independent contractor or an employee.⁴ The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.⁵

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.⁶

² P.H. Trans. at 65.

³ *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

⁴ *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

⁵ *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

⁶ *Wallis* at 102-103.

Nevertheless, the right of control test has not proved satisfactory as an exclusive determinant of the employment relationship. Other factors which Kansas courts have used in various ways to determine the employment relationship include the following:

1. The existence of a contract to perform a certain piece of work at a fixed price.
2. The independent nature of the worker's business or distinct calling.
3. The employment of assistants and the right to supervise their activities.
4. The worker's obligation to furnish tools, supplies and materials.
5. The worker's right to control the progress of the work.
6. The length of time that the worker is employed.
7. Whether the worker is paid by time or by job.
8. Whether the work is part of the regular business of the employer.⁷

This Board Member notes that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe Wisdom and Captain Hamelund testify in person. In denying Wisdom's request for medical treatment and temporary total disability benefits, the ALJ apparently believed Captain Hamelund's testimony over Wisdom's testimony. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

Based upon the following facts, among others, this Board Member finds that, for purposes of the Workers Compensation Act, at the time of the accident Wisdom was an independent contractor: (1) Wisdom provided his own equipment to perform the job, including tools, painting tools and a ladder. (2) Wisdom chose the materials for the work he performed. (3) Wisdom determined his work schedule and the number of hours that he worked. (4) Wisdom agreed that no one directed how he performed or completed the work. (5) Captain Hamelund did not tell Wisdom he could not work for anyone else. (6) The work was not part of the regular business of the respondent. (7) After the accident Wisdom requested that he be considered a volunteer because he did not have insurance.

⁷ *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

In summation, after weighing and carefully considering all the facts, this Board Member concludes that the evidence fails to establish that it is more probably true than not that Wisdom was respondent's employee at the time of the accident. Accordingly, this accident is not compensable under the Workers Compensation Act.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated July 27, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Bruce L. Wendel, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

⁸ K.S.A. 44-534a.

⁹ K.S.A. 2010 Supp. 44-555c(k).